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740422—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1222

VICTOR LAGOW, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 82–83) is reported at 159 F. 2d 245. The opinion of the district court (R. 72–76) is reported at 66 F. Supp. 738.

JURISDICTION

The judgment of the circuit court of appeals was entered December 26, 1946 (R. 83–84), and a petition for rehearing (R. 85–87) was denied January 10, 1947 (R. 88). The petition for a writ of certiorari was filed April 9, 1947. The jurisdiction of this Court is invoked under Sec-

tion 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an officer of a corporation is entitled to have suppressed as to him business records of the corporation which were illegally seized from it.

RULE INVOLVED

Rule 41 of the Federal Rules of Criminal Procedure provides in pertinent part as follows:

> (e) *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. * * *

STATEMENT

On May 2, 1946, prior to the institution of any criminal proceeding, petitioner and the Maple Motors Corporation moved in the United States District Court for the Southern District of New York to suppress for use as evidence certain property, including business records of the corporation which allegedly had been unlawfully seized from its office (R. 3–4). At a hearing on this motion, it was established that Maple Motors is a corporation engaged in the sale of new and used automobiles in New York City. Petitioner is the sole director, officer, and stockholder of the corporation. (R. 31.) One Donlin was employed as a salesman and bookkeeper (R. 8).

On April 18, 1946, the corporation, acting through petitioner, sold a used automobile to one Beecher for a price substantially in excess of the ceiling price (R. 52–53). At the conclusion of the transaction, both petitioner and Donlin were taken into custody by a policeman and two agents of the Office of Price Administration (R. 12, 35–37, 60, 63). On the following day, Donlin, accompanied by an agent of the Office of Price Administration, returned to the salesroom of the corporation and obtained from a drawer in his desk the sales records of the ten most recent sales made by the corporation. He surrendered the records to the prosecuting officials. (R. 15–19, 72.) Subsequently, when petitioner learned of this, he filed the present motion for the return

of the records and their suppression for use as evidence. The district court, in an opinion by Justice Holtzoff, sitting by designation (R. 72–76), granted the motion as to the Maple Motors Corporation, but denied it as to petitioner on the ground that the records were not his personal property and, therefore, there had been no invasion of his constitutional rights. Accordingly, on July 12, 1946, an order was entered directing that the sales records be returned to the Maple Motors Corporation and that their use as evidence against the corporation be suppressed; in respect of petitioner personally, the motion was "in all respects denied" (R. 77–78). Upon appeal to the Circuit Court of Appeals for the Second Circuit, the order of the district court was affirmed (R. 82–84).

ARGUMENT

Assuming, as the district court held, that the sales records were illegally seized from the corporation, the sole question presented is whether their use as evidence should have been suppressed, not only as to the corporation, but also as to petitioner. The gist of petitioner's contention is that since he was the sole officer, director, and stockholder of the corporation, the invasion of the corporation's right should be treated as an invasion of his personal right.

This Court recognized in *Goldstein* v. *United States,* 316 U. S. 114, 121, that "the federal

courts in numerous cases, and with unanimity, have denied standing to one not the victim of an unconstitutional search and seizure to object to the introduction in evidence of that which was seized." For only the rights of the person whose property has been illegally seized have been infringed and only he is aggrieved by the misconduct. In applying this doctrine to a situation in which the property has been illegally seized from a corporation, the courts have held that the corporation may secure the return of the property and its suppression for use as evidence against the corporation, but the courts have refused to suppress such evidence as against officers, directors, or stockholders of the corporation. At least for purposes of the Fourth Amendment, the separate identities of a corporation and its officials or stockholders have been strictly maintained. *United States* v. *Antonelli Fireworks Company, Inc.*, 155 F. 2d 631, 636 (C. C. A. 2), certiorari denied October 14, 1946, No. 134, this Term; *A. Guckenheimer & Bros. Co.* v. *United States*, 3 F. 2d 786, 788–789 (C. C. A. 3), certiorari denied, 268 U. S. 688; *Newingham* v. *United States*, 4 F. 2d 490, 493 (C. C. A. 3), certiorari denied, 268 U. S. 703; *Bilodeau* v. *United States*, 14 F. 2d 582, 585 (C. C. A. 9), certiorari denied, 273 U. S. 737; *United States* v. *Gass*, 14 F. 2d 229 (M. D. Pa.); *United States* v. *Hoyt*, 53 F. 2d 881, 884–885 (S. D. N. Y.); cf.

Schenck v. *United States,* 249 U. S. 47, 50; *Haywood* v. *United States,* 268 Fed. 795, 804 (C. C. A. 7), certiorari denied, 256 U. S. 689; *Cravens* v. *United States,* 62 F. 2d 261, 266 (C. C. A. 8), certiorari denied, 289 U. S. 733.[1] As expressed by the court below (R. 82–83), the theory of the decisions is that—

> When a man chooses to avail himself of the privilege of doing business as a corporation, even though he is its sole shareholder, he may not vicariously take on the privilege of the corporation under the Fourth Amendment; documents which he could have protected from seizure, if they had been his own, may be used against him, no matter how they were obtained from the corporation. Its wrongs are not his wrongs; its immunity is not his immunity.

Similar considerations underlie the interpretation and application given the privilege against self-incrimination. It has long been settled by this Court that an officer of a corporation is privileged against the compulsory production of his private books and papers, but that the privilege does not extend to the books of the corporation in his possession, even though the records were made by himself and would incriminate him. *Wilson* v. *United States,* 221 U. S. 361, 377–386; *Essgee Co.* v. *United States,* 262 U. S. 151, 158.

[1] Compare with these decisions, *Reeve* v. *Howe,* 33 F. Supp. 619 (E. D. Pa.).

This is so even though the corporation has been dissolved and the books and records have been transferred to the former officers of the corporation as tenants in common. *Wheeler* v. *United States,* 226 U. S. 478. And more recently, the same doctrine has been applied against an officer of an unincorporated labor union. *United States* v. *White,* 322 U. S. 694.

The records involved in this case are sales records kept in the ordinary course of business, which reflect the transactions in which the Maple Motors Corporation was engaged. They are records which were required to be kept by the New York City police department (see R. 40–42). In no sense were they the personal records of petitioner, and it is therefore plain under the decisions cited above that he was not personally entitled to have them suppressed as evidence.

We think that petitioner's reliance on *Silverthorne Lumber Co. Inc.* v. *United States,* 251 U. S. 385, is unavailing. The issue there concerned the corporation's rights under the Fourth Amendment, not those of its officers. The facts were that government agents illegally seized various records and after obtaining desired information from them, returned them to the corporation. Thereafter, the records were subpoenaed for use before a grand jury, and an officer of the corporation refused to produce them. The corporation was fined for contempt, and the officer was ordered imprisoned until he should produce the

books and documents. This Court reversed the order of the district court, pointing out that the corporation was entitled to protection against unlawful searches and seizures and that in enforcing this protection the Government would not be permitted to use information obtained as a result of the illegal search and seizure as a basis for later subpoening the books and documents. The Court was concerned with vindication of the rights of the corporation and the question whether an officer of the corporation was entitled to have suppressed as to him illegally seized corporate books was neither argued nor decided. Cf. *In re Dooly,* 48 F. 2d 121 (C. C. A. 2).

Rule 41 (e) of the Federal Rules of Criminal Procedure likewise does not aid petitioner. The note of the advisory committee, of which the district judge below was an active member, states that, with exceptions not here material, paragraph (e) "is a restatement of existing law and practice."[2] The rule provides that "A person aggrieved by an unlawful search and seizure" may move for the return of the property and to suppress it for use as evidence. It provides further that if the motion to suppress is granted, the property shall be restored and "it shall not be

[2] The note refutes petitioner's argument (Pet. 18–20) that the successive changes in paragraph (e) in the preliminary drafts of the rule reflect an intention to depart from the proprietary interest principle which was the settled rule. It shows, instead, that the changes in phraseology were merely clarifications in language.

admissible in evidence at any hearing or trial." While this latter provision is broad enough in its terms to suggest that evidence illegally seized may never be used in any judicial proceeding, regardless of whether the person from whom it was seized is a party to such proceeding, we think it plain that the language must be read in the context of paragraph (e), which deals with the rights of a "person aggrieved by an unlawful search and seizure." In the complete absence of any history indicating that paragraph (e) was intended to work a fundamental departure from the settled principle that one who is not the victim of an illegal search and seizure may not complain of it, and in the face of the recent recognition of the doctrine by this Court in the *Goldstein* case (*supra*, pp. 4–5), we think the only reasonable construction of the provision upon which petitioner relies is that only the victim of an illegal search and seizure is entitled to have the property suppressed for use as evidence against him. It does not mean that anyone against whom illegally seized evidence may be used is one "aggrieved" by the illegal seizure.

We are mindful that the view of the court below as to the proper construction of Rule 41 (e), with which we agree, cannot be reconciled with a recent decision of the District Court for the District of New Jersey, where it was held that defendants who had no proprietary interest in property which had been illegally seized from a

codefendant were entitled to have it suppressed as evidence against them. It was the court's view that Rule 41 (e) was a departure from the proprietary interest doctrine which has always prevailed. *United States* v. *Janitz,* 6 F. R. D. 1. We think the decision is clearly erroneous, and the Government took an appeal to the Circuit Court of Appeals for the Third Circuit. The appeal was dismissed on April 16, 1947, on the ground that the District Court's order dismissing the indictment because all the Government's evidence had been suppressed was not appealable under the Criminal Appeals Act. The Third Circuit said, however, that the question "has been answered briefly, but with complete clarity, by the Second Circuit in *Lagow et al.* v. *United States,* 159 F. 2d 245 (C. C. A. 2, 1946) in a manner contrary to the ruling of the learned District Judge."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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